Office-Supreme Court, U. S.
FILED
FEB 1 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 446

CREST SPECIALTY (NOT INC.) A LIMITED PARTNERSHIP CONSISTING OF BEN B. MANASTER, ROSE MANASTER, CAROL RUTH MANASTER AND SOL ELIOT,

Petitioner,

vs.

DAVID C. TRAGER, DOING BUSINESS AS TOPIC TOYS, AND EOINA NUDELMAN, AN INDIVIDUAL,

Respondents.

REPLY BRIEF FOR PETITIONER.

Re Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

CLARENCE E. THREEDY,
Attorney for Petitioner.

THE LAKESIDE PRESS, R. R. DONNELLEY & SONS COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 446.

CREST SPECIALTY (NOT INC.) A LIMITED PARTNERSHIP CONSISTING OF BEN B. MANASTER, ROSE MANASTER, CAROL RUTH MANASTER AND SOL ELIOT,

Petitioner,

vs.

DAVID C. TRAGER, DOING BUSINESS AS TOPIC TOYS, AND EOINA NUDELMAN, AN INDIVIDUAL,

Respondents.

REPLY BRIEF FOR PETITIONER.

Re Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is petitioner's reply to respondents' brief urging that certiorari be denied.

The respondents in their brief in urging that the petition for certiorari be denied have made reference to and attempted to distinguish (p. 1) this case from the very recent decision of this Court in the case of the *Great Atlantic &*

Pacific Tea Co. v. *Super Market Equipment Corp.*, decided December 4, 1950, and reported in Volume 87 U. S. P. Q. 303. In that case this Court set forth its ideas as to the high standard which must be used in judging what constitutes patentable invention. The decision was particularly concerned with a combination claim. The claims of the Nudelman patent here in issue are combination claims, defining a device squarely within the definition of a "gadget," which, in the concurring opinion in the case above referred to, it is said has "no place in the Constitutional scheme of advancing scientific knowledge".

The decision of the Court of Appeals for the Seventh Circuit in this case in affirming the judgment of the District Court holding such combination claims valid and infringed was decided October 16, 1950, prior to the decision of this Court in the *Great Atlantic & Pacific Tea Co.*, case, *supra*. The petition for writ of certiorari in this case was filed December 6, 1950, two days subsequent to the decision of this Court in the *Great Atlantic & Pacific Tea Co.* case, *supra*.

The petition for writ of certiorari here presents for determination substantially the same question presented in the latter case, namely, whether the Court of Appeals for the Seventh Circuit in this case applied correct criteria of invention. In two cases where related questions are presented, this Court has frequently heard and determined the co-related petitions.*

---

* Illustrative cases in which this was done are:
Phelps Dodge Corporation v. *National Labor Relations Board*, and *Continental Oil Co.* v. *National Labor Relations Board*, Nos. 387 and 413; *Consolidated Rock Products Co.* v. *Du Bois*, and *Badgley et al.* v. *Du Bois*, Nos. 400 and 444; *Guggenheim* v. *Rasquin*, and *Powers* v. *Commissioners*, Nos. 92 and 486, respectively; *Helvering* v. *Oregon Mutual Life Insurance Co.* and *Helvering* v. *Pan-American Life Insurance Co.*, Nos. 564 and 264, respectively; *Helvering* v. *Janney* and *Gaines et al.* v. *Helvering*, Nos. 36 and 113.

Petitioner is of the firm belief and opinion that had the Court of Appeals for the Seventh Circuit had the benefit of this Court's decision as announced in the *Great Atlantic & Pacific Tea Co.* case, *supra,* it would have held the two claims in issue (which define a device which does not structurally or functionally differ from the prior art in any substantial degree) invalid as not having met the Constitutional test of invention as now laid down by this Court in the case referred to.

Unless certiorari is granted in this case, the slight factual differences between this case and the *Great Atlantic & Pacific Tea Co.* case, *supra,* will undoubtedly be regarded as distinguishing the two cases and result in erroneous interpretation of this Court's decision in the *Great Atlantic & Pacific Tea Co.* case, which latter case has been in two recent decisions relied upon as the now-existing law with respect to the test of invention. *Vapor Blast Mfg. Co., et al.* v. *Pangborn Corp.* (C. A. 4th), 88 U. S. P. Q. 35 at 39; *Ingersoll-Rand Co.* v. *Black & Decker Mfg. Co.* (D. C. Md.), 88 U. S. P. Q. 150 at 152.

It is respectfully submitted that under the foregoing circumstances, the petition for writ of certiorari as prayed for by petitioner should be granted.

Respectfully submitted,

CLARENCE E. THREEDY,
Attorney for Petitioner.